IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

AS.No. 213 OF 2001(A)
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OS.349/1993 OF SUB COURT, ALAPPUZHA

APPELLANT/DEFENDANT:

KERALA FINANCIAL CORPORATION,
VELLAYAMBALAM, THIRUVANANTHAPURAM,
REPRESENTED BY ITS MANAGING DIRECTOR.

BY ADV. SRI.V.B.UNNIRAJ

RESPONDENTS/PLAINTIFF:

KALYANIKUTTY AMMA, PERUMANA,
KARIELAKULANGARA,
ALAPPUZHA. ( DIED)

ADDL. RESPONDENT NO: 2:

S. KRISHNAPILLAI, S/O. KALYANIKUTTY AMMA,
PERUMANA, KAREELAKULANGARA, ALAPUZHA.

(LEGAL HEIR OF THE DECEASED RESPONDENT IS IMPLEADED
AS PER ODER DATED 24.11.2004 ON I.A. 2997/2004).

BY ADV. SRI. V.G. ARUN.

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD
ON 26/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

**A.S. NO. 213/2001**

ORDER ON CMP NOS. 7299/2001, I.A. 695/2003 & I.A. 2998/2004
IN A.S. NO. 213/2001

// DISMISSED //

26.9.2007. SD/-
P.R. RAMAN, JUDGE.

SD/-
V.K. MOHANAN, JUDGE.

// TRUE COPY //

P.S. TO JUDGE.

P.R. RAMAN & V. K. MOHANAN, JJ.

A.S. NO. 213 OF 2001

DATED THIS, THE 26TH DAY OF SEPTEMBER, 2007.

J U D G M E N T

Raman, J.

The defendant in O.S. 349/1993 on the file of the Sub Court, Alappuzha, the Kerala Financial Corporation, is the appellant before us. It is a statutory Corporation under the State Financial Corporation Act. The respondent instituted the suit for damages said to have been caused to the assets of the unit by the alleged negligence on the part of the appellant. According to the plaint averments, the plaintiff started the industry by name "Sankar Ice Works" by availing a loan from the appellant/defendant in 1974. Necessary documents in that regard were also executed. In respect of the loan availed by the plaintiff, interest subsidy was granted by the Government and received by the defendant. According to the plaintiff, she repaid the entire amount with interest thereon and even overpaid an amount of Rs. 14,407/-. But the appellant issued notice to the plaintiff alleging that she is a defaulter. Plaintiff then instituted O.S. 669/1985 before the Munsiff's court, Alappuzha for a declaration that no amount is due from her to the appellant and for a declaration that she is entitled for the benefit of

interest subsidy and for a consequential injunction. The suit was contested by the appellant( defendant therein). The suit happened to be dismissed and immediately thereafter, the appellant issued notice invoking Section 29 of the State Financial Corporation Act. But as against the dismissal of the suit, the respondent/plaintiff preferred an appeal as A.S.59/1990 before the Sub Court, Alappuzha, which was eventually allowed and decreed the suit. The said judgment and decree became final. The Sub Court passed an order of injunction restraining the appellant herein from taking over the industrial unit under Section 29 of the Act. But contrary to the said order, the unit was taken over by the appellant on 13.7.1990 and it is alleged that the said action is totally mala fide. The unit was in good working condition at the time when it was taken over by the appellant herein. The respondent herein filed I.A. 944/1992 at the appellate stage for getting re-delivery of the property, which was allowed. C.R.P. 1826/1990 filed by the appellant before this Court challenging the order passed in the said I.A. was allowed by way of remand. It was thereafter that the appeal A.S. 59/1990 was re-heard and allowed in favour of the respondent. The I.A. was also allowed directing the appellant herein to surrender the industrial unit to the respondent/ plaintiff. The appellant herein preferred S.A. 897/1990 and C.R.P. 2168/1990 therefrom before this court. The said C.R.P. was allowed

and I.A. 944/1990 was dismissed. Then the plaintiff filed O.P. 10728/1992 before this Court for getting re-delivery of the property which was eventually allowed. As per the order on CMP No. 5826/1990 in W.A.888/1990 which was filed by the appellant, this Court directed the appellant to surrender the industrial unit within two weeks and it was pursuant to the said order that the appellant surrendered the unit to the respondent, after a long contest. The second appeal preferred by the appellant against the judgment and decree in A.S. 59/1990 was also dismissed. Thereafter, another suit for injunction was filed by the respondent for a mandatory injunction directing the appellant herein to conduct repairs and to replace the machineries. The said suit was not however, pursued as according to the respondent, the delay, if any, caused in obtaining such injunction would adversely affect her interest. Hence the respondent herself repaired and replaced the machineries.

2. The respondent/ plaintiff filed the present suit, for recovery of an amount of Rs. 3,85,295/- under different heads. It was inter alia contended that the appellant was in unlawful possession of the industrial unit from 13.7.1990 to 4.2.1991 knowing fully well that they are not liable to be in possession of the same, that due to lack of proper care and caution in the matter of up-keep of the machineries, she had to undertake extensive repairs

to make them in working condition, that the machineries remained idle for six months which got rusted and destroyed for ever and that the appellant/defendant did not take any steps to run the unit nor any action taken to save the machinery from destruction.

3. The appellant/defendant in the written statement denied the plaint averments except to the extent admitted therein. The fact that a loan was availed by the plaintiff is beyond dispute. According to the appellant, the rate of interest varied from time to time, that there was an agreement entered into between the Government and the defendant on 18.6.1971 whereby the Government undertook to subsidize the payment of a portion of interest due on loans and that agreement was substituted by a new agreement on 25.4.1973 whereby the Government agreed to pay interest subsidy to loans up to Rs. 3 lakhs, that in that agreement it was specifically provided that after 31.3.1974, either parties to that agreement shall have the right to terminate the agreement after giving three months time in writing to the other, that since the Government failed to perform its part of the agreement, the defendant decided to terminate the agreement and notice to that effect was given on 13.7.1977, that in view of the specific clause in the agreement to the effect that the termination by the parties in respect of interest subsidy will not be applicable to loans already granted by the Corporation whether

disbursed in full or in part before such termination, the Government was liable to pay interest subsidy for the loans which were disbursed in full or in part before the date of termination. According to the Corporation, they decided to charge higher rate of interest doubting as to whether the Government will be releasing the amount properly. According to the appellant, at the time of re-delivery of the property as per the order of the court, there was no complaint from the plaintiff regarding the alleged damages. They also disputed the quantum of damages on various other grounds. In order to avoid repetition, the various other averments made in the written statement are not repeated herein.

4. The court below framed necessary issues. The evidence in the case consists of the oral testimony of PWs 1 to 5 and Exts.A1 to A23(a) on the side of the plaintiff/Respondent. No oral or documentary evidence is adduced by the defendant/appellant.

5. The court below found that it is the common case of the parties that a loan of Rs.2,98,200/- was sanctioned at a subsidized rate of interest of 5 1/2 % per annum. But as per the hypothication agreement executed by between the respondent/ plaintiff and the appellant/defendant, the appellant claimed enhanced rate of interest. The question whether the respondent / plaintiff is entitled to get interest subsidy was decided in favour of the

respondent in the final judgment rendered in O.S. 669/1985 and the said judgment become final and thus binding on the parties. Therefore, it is not open for the appellant to raise a contention regarding the admissibility of the subsidy by the respondent in this case. The court below also found that apart from the interest subsidy, no amount was due to the appellant from the respondent at the time when the unit was taken over by them. The court below considered the various exhibits produced in the case and quantification of damages was made based on the documentary evidence produced in the case. Such a finding cannot be said to be perverse or illegal. As against the claim of Rs.3,85,295/- the court below granted a decree in favour of the plaintiff only for an amount of Rs.1,30,000/- with interest at 12% per annum from the date of suit till the date of judgment and 6% per annum thereafter till realisation and proportionate costs.

6. Even though the learned counsel Sri. Unniraj, appearing on behalf of the appellant would contend that the finding of the court below that as on the date of taking over except the subsidy amount no other amount is payable is not correct. However, this contention could not be substantiated by placing reliance on the materials available on record. The appellant did not adduce any evidence either oral or documentary. If the appellant had a case that more amounts are due and payable then it was their burden to

produce evidence thereon and to justify the take over. There was no such attempt made by the appellant and in the absence of any evidence and having not discharged their burden, it is not open to the appellant now to contend that the taking over was justified as more amounts were due, which is a contention unsupported by any evidence in the case.

7. Further, Ext.A3 is the copy of the judgment in O.P. 10728/1990 wherein this court observed that no amount was due from the respondent to the appellant if interest was calculated at the rate of 5.5% per annum. The appeal preferred against the said decision by the appellant herein, was eventually dismissed. it has to be noticed in this connection that both sides were directed to file statement showing the amount due from the respondent, if the interest on loan is calculated at 5.5% per annum and in compliance with that direction, the appellant had also filed a statement wherein it is stated that "if interest is calculated at 5.5% there is nothing due from the respondent." Therefore, going by the appellant's own statement in the earlier writ petition if the interest is calculated at 5.5% per annum, there cannot be any further liability to be discharged by the respondent as on the date of taking over. By virtue of the decree passed in A.S. 59/1990 by the Sub Court, Alleppey, which became final, the question regarding entitlement of subsidy by the respondent cannot be re-agitated.

8. In the above admitted facts and circumstances and in view of the categorical statement made in the writ petition filed before this court by the appellant, it has to be found that there was no amount legally due and payable as on the date of taking over. The respondent had to take various proceedings for getting re-delivery of the property and in that process the appellant continued to be in possession until it was re-delivered by an order of the court, during which time, the appellant ought to have kept the machineries and other articles in working condition. When the taking delivery of the property by the appellant herein is found to be wrong and illegal, any damages caused to the machinery and to make it in working condition by undertaking repairs are certainly liable to be compensated to the respondent/plaintiff. Though large amounts were claimed, it was after analyzing the evidence on record, the court below has passed a decree for a lesser amount with interest as aforesaid. We do not find any good ground to interfere with the decree passed by the court below.

9. Learned counsel for the appellant, however, prayed that at least the rate of interest may be reduced. We heard both sides. Though the respondent claimed interest at 12% per annum, in the absence of any material to show that she had to avail any loan by paying such rate of interest for undertaking the repairs, we think, in the facts and circumstances

of the case, the rate of interest could be reduced to 10% instead of 12%. Accordingly, we modify the decree passed by the court below and decree the suit as follows:

10. The suit is decreed in part allowing the plaintiff to recover an amount of Rs. 1,30,000/- (One lakh thirty thousand) with interest at 10% per annum from the date of suit till the date of the judgment passed by the court below and thereafter at 6% per annum till realisation. Except to the above extent, the decree passed by the court below is confirmed. The appeal is thus partly allowed. However, in the circumstances, the parties shall bear their respective costs.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

P.R. RAMAN &
V.K. MOHANAN, JJ.
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A.S. NO. 213/2001
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**J U D G M E N T**

**26TH OCTOBER, 2007.**